

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: William J. Lenkeit, Senior Commission Counsel, Legal Division
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Subject: Adoption of Proposed Amendments to Regulations 18225.4 and 18428,
and Adoption of Regulation 18215.1 — Aggregation of Contributions and
Independent Expenditures.

Date: February 27, 2006

I. EXECUTIVE SUMMARY

Currently, contributions or independent expenditures are aggregated, and treated as if made from one source, when the payment made from each source is directed and controlled by the same individual or a majority of the same persons. (Sections 84211 and 85311.) This rule, which dates back to two 1976 Commission opinions — *In re Lumsdon* (1976) 2 FPPC Ops. 140 and *In re Kahn* (1976) 2 FPPC Ops. 151, has been in effect for most of the history of the Political Reform Act (the “Act”).¹

Section 85311, which was adopted as part of Proposition 34 passed in 2000, provides for aggregation of contributions for purposes of the contribution limits applicable to state candidates. Its language originated in Commission regulation 18215.1, which was adopted in 1995 (along with its sister regulation 18225.4, applying the same aggregation rule to independent expenditures) but was repealed in the aftermath of the passage of Proposition 208 as inconsistent with its provisions. With the passage of Proposition 34, although the former regulatory language was incorporated in the new statute, its application is limited, and the Commission currently has no statute or regulation defining aggregation for purposes other than the campaign contribution limits imposed under Proposition 34.

This regulatory project includes one new and two amended regulations to clarify the Commission’s policy on aggregation and the reporting requirements relevant thereto.

First, staff believes that it is appropriate at this time for the Commission to adopt a new regulation (18215.1) defining the aggregation requirements under the Act for application in circumstances other than state contribution limits. The proposed language

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All statutory references are to the Government Code unless otherwise indicated.

is identical to the aggregation provisions under section 85311 and would reinstate, with minor changes, the previous aggregation of contributions regulation rescinded after Proposition 208, and again codify long-standing advice with respect to when contributions are aggregated.

Second, proposed minor amendments to regulation 18225.4 regarding aggregation of independent expenditures are offered to conform the language with the aggregation of contributions language used in section 85311 and the newly proposed regulation 18215.1.

Finally, the three Decision Points addressed in the proposed amendments to regulation 18428 are offered to: (1) provide clearer guidance to the regulated community as to how the filer is to be identified when reporting aggregated contributions or independent expenditures; (2) establish an easier means for the public to identify the person who directs and controls the source of an aggregated contribution when viewing a recipient committee campaign report; and (3) extend the reporting requirements for major donor and independent expenditure committees to recipient committees in identifying aggregated contributions.

At the January Commission prenotice meeting, the Commission considered certain language defining direction and control and circumstances indicating independent action and decided those provisions were unnecessary. The Commission directed staff to return with language for adoption limited to the provisions discussed herein.

II. BACKGROUND

The Political Reform Act establishes certain monetary thresholds for reporting purposes. For example, section 82013 defines a “committee” as any person or combination of persons who: (a) receive contributions of \$1,000 or more in a calendar year – a recipient committee; (b) make independent expenditures of \$1,000 or more in a calendar year – an independent expenditure committee; or (c) make contributions totaling \$10,000 or more in a calendar year – major donor committee. Once a person or combination of persons meets any of these requirements, the committee is required to file certain periodic campaign reports reflecting its activity.

Under long-established Commission policy, contributions or independent expenditures made from different sources must be combined and treated as if from the same source under certain circumstances. For example, if an individual makes a contribution from his or her personal funds and then makes an additional contribution from a business entity in which he or she is the sole owner, ordinarily, these payments must be combined into one total, and the individual and the business could qualify as a major donor committee under section 82013, subdivision (c).

Commission policy regarding aggregation was developed from two early Commission opinions – *In re Lumsdon* (1976) 2 FPPC Ops. 140 and *In re Kahn* (1976) 2

FPPC Ops. 151.² These principles were later implemented in three Commission regulations defining the rules for aggregation and setting the procedures for reporting aggregated contributions and independent expenditures for major donor and independent expenditure committees. The three regulations are the subject of this examination.

At the January Commission meeting³ the Commission considered and rejected prenotice language in proposed regulation 18205 that would have provided operational guidelines defining “direction and control” and under what circumstances independence of action in the decision to make the payment would be established. The Commission directed staff to return with proposed language adopting new regulation 18215.1 regarding aggregation of contributions, and proposed amendments to regulation 18225.4 to conform its language to the proposed language in new regulation 18215.1 and the statutory language in section 85311. The Commission further directed staff to return with proposed language providing options for amendments to regulation 18428, the reporting regulation, in order to clarify its procedures, as summarized below.

By way of background, the original regulations 18215.1 (Contributions; When Aggregated) and 18225.4 (Independent Expenditures; When Aggregated) contained identical language setting forth the Commission’s rules for determining when payments are to be aggregated under the provisions of the Act. Essentially, the regulations provided that payments (contributions and independent expenditures, respectively) made by an entity were to be aggregated with the payments made by an individual whenever the individual directed and controlled the decision to make the entity’s payment. Similarly, payments made by an entity were to be aggregated with the payments made by another entity or entities if each entity’s payment was directed and controlled by a majority of the same persons. The regulations also provided that payments made by entities that were majority owned by the same person or a majority of the same persons should be aggregated with the payments of the majority owner(s) unless the entities acted independently of the majority owner(s) in their decisions to make the payments. Finally, regulation 18428 was enacted to provide the requirements and procedures for reporting aggregated contributions by committees.

Regulation 18225.4 still stands in its original form. **Regulation 18428**, contains much of the same language or overall essence of the original version, although it has undergone numerous amendments as a result of the fluctuating statutory changes implemented by the passage of various state propositions and, with respect to some, their later invalidation by the courts. However, **regulation 18215.1** was repealed in 1997, as it was deemed “too vague and too narrow in its coverage to save” under the new provisions of Proposition 208. Although the provisions of Proposition 208 were invalidated by the courts, no action was taken to reinstate the provisions of regulation 18215.1.

² A thorough review of the opinions and Commission advice regarding aggregation can be found in the Prenotice Discussion of Amendments to the Aggregation Regulations— Regulations 18225.4 and 18428, and Adoption of Regulations 18215.1, 18205 and 18513.11 (“Prenotice Memorandum”) presented at the January Commission meeting.

³ The Commission requested that the companion project presented at the January meeting, regarding amendments to regulations under section 84308, be brought back separately for adoption at the May Commission meeting.

With the passage of Proposition 34 in 2000, which repealed the provisions of Proposition 208, a new statute was born from the ashes of regulation 18215.1 in section 85311. Section 85311 provides the procedure for aggregation of contributions with respect to the newly imposed campaign contributions limits incorporated into the Act by Proposition 34. With the exception of a few minor changes in language, the new statute provides identical requirements for aggregation as those imposed by the previous regulation. However, these provisions were only made applicable to the contribution limits for state candidates. While current Commission advice still reflects the aggregation concepts contained in the previously repealed regulation, there is currently no regulation which adequately defines Commission policy on the aggregation of contributions. Proposed regulation 18215.1 seeks to fill the gap left with the previous repeal of that regulation and codify long-standing Commission policy regarding aggregation of contributions.

III. DISCUSSION OF AFFECTED REGULATIONS

Staff seeks the Commission's determination on various issues as discussed below.

Proposed Adoption of Regulation 18215.1 and Amendment to Regulation

18225.4: As stated above, section 85311 in its present form, incorporated into the Act under Proposition 34, is essentially the same language as was used in former regulation 18215.1. Because the current statute applies only to the contribution limits for state candidates imposed by Proposition 34, the Commission does not have a regulation defining when contributions are to be aggregated in situations other than those applicable under section 85311 (i.e. major donor committees, section 84308 limits, advertisement disclosure and other purposes under Chapters 4 and 5, and for local campaign limits where the Commission's aggregation provisions are applied). Proposed regulation 18215.1 fills that gap.

At the January prenotice meeting, the Commission directed staff to remove certain additional language that had been added to proposed regulation 18215.1 and the proposed amendments to regulation 18225.4, as unnecessary. The language currently offered in proposed regulation 18215.1 is identical with the language contained in the statutory provision of section 85311.

Along the same lines, the proposed changes to the aggregation of independent expenditures language in regulation 18225.4 modifies that regulation to conform with the provisions of the statute and the aggregation of contributions language of the proposed new regulation 18215.1, thereby establishing consistency throughout the provisions requiring aggregation.

Proposed Amendments to Regulation 18428: Finally, regulation 18428 is the basic reporting regulation for major donor and independent expenditure committees that was adopted in 1979 pursuant to the *Lumsdon* and *Kahn* opinions. One of the issues raised at the interested persons' meeting was that the regulation was too confusing and difficult to understand. The proposed amendments hope to clarify some of that confusion.

Subdivision (a) deletes the reference to “affiliated entities,” as that term adds unnecessary confusion to the process, and clarifies that the rules regarding the reporting of aggregated contributions and independent expenditures are applicable to the monetary thresholds established in Chapter 4 and Chapter 5 of the Act.

Subdivision (b) identifies the filing procedures for major donor and independent expenditure committees. The requirement that the report be filed in the name of the individual who directs and controls the making of an entity’s payments and reflect the total payments aggregated remains the same as current subdivision (b), although the language has been modified somewhat by eliminating the reference to the term “affiliated entities.” **Decision Point 1** addresses a current area of confusion in determining what identification is required under the name of filer on the report. The regulation now provides that “the campaign statement shall be filed in the name of the person who directs and controls the expenditures of the affiliate or affiliates, *with an indication that the campaign statement includes the activity of these entities.*” (Emphasis added.) The Form 461 apparently interprets this provision to require identification of the aggregated contributions of other entities under the “name of filer” block, in that the form provides “[i]nclude names(s) of all affiliated entities whose contributions are included in this statement.”

Decision Point 1 now provides two options for the identification required under the name of filer. The first option requires the filer under the “name of filer” section of the report to list the name of all entities whose contributions are included as currently indicated on the Form 461.

Example — Option 1

1. Name and Address of Filer		
NAME OF FILER (Include name(s) of all affiliated entities whose contributions are included in this statement.)		
John Jacob Astor, The Astor House, American Fur Co., Pacific Fur Co., Eastside Properties, Westside Development, All Around The Town Investments		
RESIDENTIAL OR MAILING ADDRESS		(NO. AND STREET)
CITY	STATE	ZIP CODE
RESPONSIBLE OFFICER (If filer is other than an individual)		AREA CODE/DAYTIME PHONE

Option 2 provides that the report indicate under the name of filer that the report includes aggregated contributions from other entities (e.g. “Name of Filer” including aggregated contributions). This option is how the regulation is currently interpreted but implementing this option would require a change in the form. (See attached draft of changes to Form 461.)

Example — Option 2

1. Name and Address of Filer		
NAME OF FILER (Include name(s) of all affiliated entities whose contributions are included in this statement.) John Jacob Astor, including aggregated entity contributions		
RESIDENTIAL OR MAILING ADDRESS (NO. AND STREET)		
CITY	STATE	ZIP CODE
RESPONSIBLE OFFICER (If filer is other than an individual)		AREA CODE/DAYTIME PHONE

Pro – By requiring each of the entities to be listed under the name of filer an individual viewing the report could more easily identify all the entities whose contributions or independent expenditures are included in the report, and would be better able to search for contributions made by each entity.

Con – The added requirement would impose an additional burden on the filer and may lead to some unintentional violations.

Subdivision (c) sets out the reporting provisions for recipient committees who receive aggregated contributions. Under current subdivision (d), the recipient committee is required to “report the contribution as received from the contributor ‘and its affiliated entities,’ but shall not be required to list the name of each affiliate.” **Decision Point 2** now provides Option 1 requiring the recipient committee to identify both the contributor and the name of the “filer” under which the contribution was reported on the major donor and independent expenditure committee campaign statement (Form 461) when it receives a contribution which is subject to aggregation. This provision was added at the suggestion of attorney Vigo Nielsen at the interested persons’ meeting, as a method for a concerned citizen to more easily identify the actual source of an aggregated contribution when viewing a recipient committee’s campaign report. Under Option 2, the current requirement would remain in effect, and the recipient committee would simply provide the name of the entity from which the contribution is received and identify the contribution as an aggregated contribution, but it would not be required to identify the name of the individual or entity whose contributions the contribution is aggregated with (the “person” who directs and controls the contribution and under whose name it is reported on the Form 461).

Pro – As stated above, the additional requirement would provide enhanced identification of aggregated contributions and would synchronize the identification

requirements between the two reports, allowing anyone viewing the recipient committee report to more easily identify the source of the reported contribution.

Con – The new requirement would impose additional burdens on committee treasurers in providing identification of the sources of aggregated contributions.

The final proposed amendment under this regulation is contained in **Decision Point 3**. This would apply the same aggregation rules now applicable to major donor and independent expenditure committees, to reporting by recipient committees. Accordingly, a recipient committee would have to both disclose on its report any contributions it made that were aggregated with another individual or entity, and notify the recipient of that contribution that the contribution was aggregated with a contribution from another entity directed and controlled by the same person controlling the recipient committee that makes the contribution.

Staff Recommendation: Staff recommends that the Commission adopt proposed regulation 18215.1 to again codify its long-standing advice regarding aggregation of contributions and, similarly, adopt the proposed amendments to regulation 18225.4, modifying its language to conform to the new regulation and the current language of section 85311 so that the procedures identified for aggregation are consistent throughout the Act.

Staff further recommends that the Commission adopt **Decision Point 1, Option 1** under regulation 18428, as this method would provide greater identification of contributions made by each entity, especially for purposes of online searching. Staff also recommends that, for the reasons stated above, the Commission adopt the language in **Decision Point 2, Option 1** requiring recipient committees to identify the person(s) who directs and controls any aggregated contributions the committee receives. Finally, staff recommends the Commission adopt **Decision Point 3** applying the reporting requirements for aggregated contributions to recipient committees.

Attachments

Draft of Changes to Form 461

Proposed regulation 18215.1

Proposed amendments to regulation 18225.4

Proposed amendments to regulation 18428